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No. 80-1648

In the Supreme Court of the United States

October Term, 1980

LEO NIERRAS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. In a state criminal prosecution, was the State relieved of the burden of establishing guilt by proof beyond a reasonable doubt, in violation of the Due Process Clause of the Fourteenth Amendment, where the *only* jury charge on burden of proof instructed that:

   (a) The defendant must be convicted if the jury is firmly convinced of the truth of the charge;

   (b) Reasonable doubt is present when the jurors, after they have carefully considered and compared all of the evidence, cannot say they are firmly convinced of the truth of the charge; and

   (c) Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon in the most important of his own affairs?

2. Whether the definition of the crime of Attempted Sexual Battery, contained in Sections 2907.03(A) and 2923.02 of the Ohio Revised Code, is unconstitutionally vague and violates the freedom of speech provision of the First Amendment by permitting a felony conviction to rest solely upon proof of unsuccessful verbal invitations to engage in sexual conduct?

TABLE OF CONTENTS

QUESTIONS PRESENTED I
TABLE OF AUTHORITIES V
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 6
REASONS FOR GRANTING THE WRIT 11

1. The decision below, upholding the Ohio statutory definitions of "reasonable doubt" and "proof beyond a reasonable doubt," and approving the standard Ohio jury instruction on the burden of proof in criminal cases, is in conflict with applicable decisions of this Court and of federal courts of appeals 11
2. The State courts below have interpreted the State statutes applicable to Petitioner's conviction in a manner which renders those statutes unconstitutionally vague and which permits conviction upon proof of wholly innocent conduct involving constitutionally protected expression 14

CONCLUSION 20

APPENDIX:

Order of the Supreme Court of Ohio Overruling Motion for Leave to Appeal (January 30, 1981) A1
Order of the Supreme Court Dismissing the Appeal (January 30, 1981) A2

PRECEDING PAGE WAS BLANK

Opinion of the Court of Appeals of Richland County, Ohio (October 10, 1980) A3

Journal Entry of the Court of Common Pleas of Richland County, Ohio, Sentencing Petitioner (March 24, 1980) A11

Jury Verdict Form of Court of Common Pleas, Richland County, Ohio A13

Excerpts from Transcript of Hearing at which Petitioner Objected to Proposed Charge to Jury (pages 271, 272, 277, 278, 281, 282, 284, 286, 290) A16

Excerpts from Transcript of the Court's Instructions to the Jury (pages 292, 304, 305, 306, 308) .. A19

Excerpts from Transcript of Hearing on Motion to Dismiss Indictments - Containing the Ruling on the Motion to Dismiss by the Court of Common Pleas of Richland County, Ohio (February 6, 1980, pages 2 and 35) A21

Excerpts from Transcript of Motion for Judgment of Acquittal A21

Indictment A24

TABLE OF AUTHORITIES

Cases

Addington v. Texas, 441 U.S. 418 (1979) 13
Brinegar v. United States, 338 U.S. 160 (1949) 12
Connally v. General Construction Co., 269 U.S. 385 (1926) 18
Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118 (1954) 13
Grayned v. Rockford, 408 U.S. 104 (1972) 18
Holland v. United States, 348 U.S. 121 (1954) 11
Household Finance Corp. v. Altenberg, 5 Ohio St. 2d 190, 214 N.E.2d 667 (1966) 13
In Re Winship, 397 U.S. 358 (1970) 14
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 18
Scurry v. United States, 347 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 389 U.S. 883 (1967) 12
State v. Collins, 60 Ohio App. 2d 116, 396 N.E.2d 221 (Hancock Cty. 1977) 19
State v. Nabozny, 54 Ohio St. 2d 195, 375 N.E.2d 784 (1978), *vacated on other grounds*, 439 U.S. 811 (1978) 11
State v. Tolliver, 49 Ohio App. 2d 258, 360 N.E.2d 750 (Hamilton Cty. 1976) 19
State v. Wilkins, 64 Ohio St. 2d 382, 415 N.E.2d 303 (1980) 19
Thornhill v. Alabama, 310 U.S. 88 (1940) 18
United States v. Acarino, 408 F.2d 512 (2nd Cir. 1969), *cert. denied*, 395 U.S. 961 (1969) 12
United States v. Cole, 453 F.2d 902 (8th Cir. 1972), *cert. denied*, 406 U.S. 922 (1972) 12

United States v. Emalfarb, 484 F.2d 787 (7th Cir. 1973), *cert. denied*, 414 U.S. 1064 (1973) 12
United States v. Richardson, 504 F.2d 357 (5th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975) 12

Constitutional Provisions and Statutes

U. S. Const., Amend. I 2, 19
U. S. Const., Amend. XIV, § 1 ..... 3, 12
28 U.S.C. §1257(3) 2

Ohio Revised Code:

§ 2901.01(A) 4,15
§ 2901.05(D) 3, 8, 11, 12
§ 2907.01(A) 4, 14, 15
§ 2907.02(A)(1) and (2) 5, 10, 15
§ 2907.03(A) 1, 4, 6, 14, 15, 17, 18
§ 2907.05 ..... 6, 12
§ 2923.02(A), (B) and (D) 1, 4-5, 6, 15

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LEO NIERRAS,
Petitioner,

vs.

STATE OF OHIO,
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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

The Petitioner, Leo Nierras, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio rendered in these proceedings on January 30, 1981.

OPINIONS BELOW

Prior to trial, Petitioner moved to dismiss the charge on which he was ultimately convicted—a charge of Attempted Sexual Battery, drafted in the language of Sections 2907.03(A) (Sexual Battery) and 2923.02 (Attempt) of the Ohio Revised Code. The motion urged, among other things, that the charge of Attempted Sexual Battery was unconstitutionally vague. On February 6, 1980, the trial court orally denied the motion without opinion (Appendix, p. A21).

On February 19, 1980, after trial by jury, Petitioner was convicted on one of six counts contained in two indictments which had been consolidated for trial. (The verdict of the jury appears at Appendix, pp. A13-A15.) On March 24, 1980, Petitioner was sentenced to imprisonment in the Ohio Penitentiary for a period of one to five years (Appendix, pp. A11-A12).

In an unreported opinion rendered on October 10, 1980, the Court of Appeals for the Fifth Appellate District of Ohio affirmed Petitioner's conviction and sentence. (The opinion appears in the Appendix at pages A3-A10.) The Supreme Court of Ohio, on January 30, 1981, overruled Petitioner's motion for leave to appeal and dismissed Petitioner's appeal, *sua sponte,* on the ground that no substantial constitutional questions were presented (Appendix, pp. A1, A2).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on January 30, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the Constitution of the United States provides, in relevant part:

> "Congress shall make no law * * * abridging the freedom of speech * * *."

Section One of the Fourteenth Amendment of the Constitution of the United States provides, in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2901.05 of the Ohio Revised Code provides, in relevant part:

"(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of 'reasonable doubt' and 'proof beyond a reasonable doubt,' contained in division (D) of this section.

(C) As used in this section, an 'affirmative defense' is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

(D) 'Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs."

Section 2907.03 of the Ohio Revised Code provides, in relevant part:

> "(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:
>
> (1) The offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.
>
> (2) The offender knows that the other person's ability to appraise the nature of or control his or her own conduct is substantially impaired."

Section 2901.01 of the Ohio Revised Code provides, in relevant part:

> **Definitions.** As used in the Revised Code:
>
> (A) "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

Section 2907.01 of the Ohio Revised Code provides, in relevant part:

> **Definitions.** As used in sections 2907.01 to 2907.37 of the Revised Code:
>
> (A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

Section 2923.02 of the Ohio Revised Code provides, in relevant part:

Attempt.

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances.

* * * * *

(D) It is an affirmative defense to a charge under this section that the actor abandoned his effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Section 2907.02 of the Ohio Revised Code provides, in relevant part:

Rape.

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

STATEMENT OF THE CASE

In two separate indictments filed in the Richland County, Ohio, Court of Common Pleas in October and November of 1979, Petitioner was charged with four counts of Gross Sexual Imposition (Ohio Revised Code § 2907.05) and two counts of Attempted Sexual Battery (Ohio Revised Code §§ 2907.03, 2923.02). At trial, two counts were dismissed by the State on the ground that there was no evidence to support the charges, and Petitioner was acquitted on three of the four remaining charges. He was convicted only on that count which alleged that, on September 4, 1979, he

> "* * * did attempt to engage in sexual conduct with Connie Fay Blackstone * * * in that he knowingly coerced Connie Fay Blackstone to submit by means that would prevent resistance by a person of ordinary resolution and that he did make said attempt knowing that Connie Fay Blackstone's ability to appraise the nature of or control her own conduct was substantially impaired, in violation of Section 2907.03 of the Ohio Revised Code, a felony of the fourth degree." (Appendix, p. A25.)

In support of the charge, the State offered evidence which established that Petitioner, a psychiatrist, had treated Connie Blackstone from November, 1978 to September of 1979, that Mrs. Blackstone complained to the police about Petitioner in August of 1978, and that as a result of Mrs. Blackstone's complaints, arrangements were made to record and monitor conversations which occurred during two, one-half-hour sessions involving Mrs. Blackstone and Petitioner.

Blackstone testified that on September 4, 1979, during the second tape recorded session with Petitioner, Petitioner

repeatedly invited her to disrobe and to engage in fellatio and sexual intercourse. She stated that he masturbated in her presence and told her he could be her doctor and her lover at the same time (Tr. 41-47). Asked to describe how she responded she stated:

"Q. What did you say or do?

A. I just stood there frozen. I said, 'No, I am not going to do it.'

Q. What did he do or say?

A. He just said, 'Come on, come on, nobody is going to come in and catch us.'

Q. What did you do?

A. I just stood there. I just kept telling him, 'No, I am not going to do it.'

Q. What happened then?

A. Well, he found out he couldn't get nowhere with me. He got up, put his clothes back on and sat down in the chair, and then I sat down.

Q. Did anything else happen during that visit?

A. No." (Tr. 46-47).

In addition to the testimony of Connie Blackstone, the State offered the testimony of two detectives who had monitored and overheard the conversation which occurred. Finally, the State offered the recording of the conversation.

At the conclusion of the State's evidence, a motion for judgment of acquittal, based on the claim that there was no evidence to establish that coercion had been employed or that Blackstone was a person whose capacity to control her conduct was substantially impaired, was overruled (Appendix, pp. A21-A23).

At the conclusion of all of the evidence, the motion for judgment of acquittal was renewed (Tr. 269). It was

again overruled (Tr. 270). The Defendant also requested that the State be compelled to elect which of the alternative charges, contained in a single count, it proposed to pursue—whether Blackstone was a person of ordinary resolution whom Petitioner had attempted to coerce into engaging in sexual conduct, or, whether she was a person whose capacity to control her conduct was substantially impaired. That motion was also overruled.

Before the jury was charged, Petitioner objected to the statutory definitions of "reasonable doubt" and "proof beyond a reasonable doubt" contained in Ohio Revised Code § 2901.05(D) on the ground that the definitions unconstitutionally reduced the burden of proof imposed upon the State by substituting the clear-and-convincing-evidence standard for the requirement of proof beyond a reasonable doubt (Appendix, pp. A16-A17).

Petitioner requested that the term "coerce" be defined as follows:

> "Coerce * * * means the exercise of some degree of force or compulsion. Mere invitation to engage in sexual conduct, unaccompanied by force, the threat of force, or any other means of compulsion, does not constitute coercion." (Defendant's Proposed Instruction No. 3).

The requested charge was denied (Appendix, p. A17). Petitioner also asked that the jury be charged that "an invitation to engage in sexual conduct is not coercive unless it is strong enough to overcome the will of a person of ordinary resolution." (Defendant's Proposed Instruction No. 4). The request was denied.

For the purpose of assisting the jury in determining whether Blackstone's ability to control her conduct was

substantially impaired, Petitioner requested that the jury be instructed as follows:

> "The fact that a person seeks and obtains pyschiatric care, in a hospital or otherwise, does not, by itself, establish that the person's ability to control her conduct is substantially impaired." (Appendix, p. A18).

The request was denied.

Petitioner objected to several portions of the charge given by the trial court, including the following:

(1) The entire charge on burden of proof was stated as follows:

> "A defendant is presumed innocent until and unless guilt is established beyond a reasonable doubt. The Defendant must be acquitted unless the State produces evidence which convinces you beyond a reasionable doubt of every essential element of the crimes charged or any lesser included offenses, which I will explain to you later on.
>
> Reasonable doubt is present when after you have carefully considered and compared all the evidence you cannot say you are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. It is not a mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.
>
> If after a full and impartial consideration of all the evidence, you are firmly convinced of the truth of the charge, you must find the Defendant guilty." (Appendix, p. A19).

(2) The court offered the jury a definition of the term "substantially *impair*," derived from Ohio's Rape statute (Ohio Revised Code § 2907.02(A)(2)) rather than a definition of the term "substantially *impaired*,"—an essential element of Sexual Battery (Appendix, p. A17). The court instructed the jury:

> "Substantially impair means to interfere with the other person's judgment or control in a material manner." (Appendix, p. A20.)

(3) The defense objected to the court's definition of the term "coerce" (Appendix, p. A17). The objection was overruled (Appendix, p. A18).

(4) The court granted the prosecutor's request that the jury be instructed that impossibility of achievement was no defense to a charge of Attempted Sexual Battery (Appendix, pp. A18, A20).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW, UPHOLDING THE OHIO STATUTORY DEFINITIONS OF "REASONABLE DOUBT" AND "PROOF BEYOND A REASONABLE DOUBT," AND APPROVING THE STANDARD OHIO JURY INSTRUCTION ON THE BURDEN OF PROOF IN CRIMINAL CASES, IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND OF FEDERAL COURTS OF APPEALS.

The definitions of "reasonable doubt" and "proof beyond a reasonable doubt", incorporated in the charge to the jury, are dictated by Ohio Revised Code Section 2901.05(D). The Supreme Court of Ohio upheld those statutory definitions in *State v. Nabozny,* 54 Ohio St. 2d 195, 375 N.E.2d 784 (1978), *vacated on other grounds,* 439 U.S. 811 (1978), relying upon this Court's decision in *Holland v. United States,* 348 U.S. 121 (1954). Such reliance was ill founded.

This Court, in *Holland,* grudgingly affirmed a definition of "reasonable doubt" as "that kind of a doubt which you folks in the more serious and important affairs of your own lives might be willing to act upon." 348 U.S. at 140. In *Holland,* the jury was to *acquit* on the basis of that kind of doubt, not to convict. In Ohio, jurors are to *convict* on the basis of the same kind of proof that required acquittal in *Holland*—proof "that an ordinary person would be willing to rely and act upon in the most important of his own affairs."

The verbal expression of the low probability of innocence which will justify acquittal, "reasonable doubt," has been converted in Ohio into the verbal expression of

the highest degree of proof required in any judicial proceeding—"proof beyond a reasonable doubt." The transposition is insidious and subtle, but the end result is the application of a standard of proof in all Ohio criminal cases which more closely resembles "probable cause" than "proof beyond a reasonable doubt." In *Brinegar v. United States,* 338 U.S. 160 (1949), this Court defined "probable cause" with language remarkably similar to the Ohio definition of "proof beyond a reasonable doubt."

> "In dealing with probable cause * * * as the very name implies, we deal with probabilities. They are not technical; they are the factual and practical consideration of everyday life upon which reasonable and prudent men, not legal technicians, act." 338 U.S. at 175.

The willing-to-act definition of "proof beyond doubt," dictated by statute in Ohio, has been repeatedly criticized and condemned by federal courts of appeals. See, e.g., *United States v. Richardson,* 504 F.2d 357, 361 (5th Cir. 1974), *cert. denied,* 420 U.S. 978 (1975); *United States v. Emalfarb,* 484 F.2d 787 (7th Cir. 1973), *cert. denied,* 414 U.S. 1064 (1973); *United States v. Cole,* 453 F.2d 902 (8th Cir. 1972), *cert. denied,* 406 U.S. 922 (1973); *United States v. Acarino,* 408 F.2d 512 (2nd Cir. 1969), *cert. denied,* 395 U.S. 961 (1969); *Scurry v. United States,* 347 F.2d 468 (D.C. Cir. 1965), *cert. denied,* 389 U.S. 883 (1967). By elevating an almost universally rejected definition of proof beyond a reasonable doubt into the exclusive language employed to convey to a jury the degree of certainty required for conviction, Section 2901.05 of the Ohio Revised Code dilutes the reasonable doubt standard and violates the Due Process Clause of the Fourteenth Amendment.

The defect in the charge prescribed by Section 2901.05 (D) is exacerbated by the statutory definition of "reasonable doubt"—a definition which clearly conveys the

notion that the State is required to prove guilt only by clear and convincing evidence. If the jurors "cannot say they are firmly convinced of the truth of the charge," then, and only then, do they have a doubt which is recognized as "reasonable" in the State of Ohio. The charge is virtually identical to that employed in Ohio to inform the jury of the clear-and-convincing-evidence standard:

> "Clear and convincing evidence is that measure or degree of proof *which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.*" *Cross v. Ledford,* 161 Ohio St. 469, 120 N.E.2d 118, 123 (1954) (emphasis added).

The Supreme Court of Ohio has also recognized that clear and convincing evidence is "less than the degree required in a criminal case but more than that required in an ordinary civil action." *Household Finance Corp. v. Altenberg,* 5 Ohio St. 2d 190, 214 N.E.2d 667, 670 (1966). Similarly, this Court has described clear and convincing evidence as a "middle level of burden of proof" between the preponderance standard and the requirement of proof beyond a reasonable doubt. *Addington v. Texas,* 441 U.S. 418, 431 (1979).

If the reasonable-doubt standard was not abandoned, in the instant case, by the statutory definitions of "reasonable doubt," and "proof beyond a reasonable doubt," it was unequivocally repudiated when the jury was explicitly told to convict if "firmly convinced of the truth of the charge." That charge, supplemented by no language which has traditionally been employed to convey to the jury the high degree of certainty required for conviction, violates a clearly stated command of this Court:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explic-

itly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship,* 397 U.S. 358, 364 (1970).

This Court's command will become empty rhetoric if states are left free to define "proof beyond a reasonable doubt" in a manner which plainly authorizes conviction on proof which establishes a substantial probability of innocence. Petitioner is not asking this Court to establish a universal definition of "proof beyond a reasonable doubt." Perhaps the term should not be defined at all. It must not, however, be defined in a manner which reduces it to a meaningless formalism.

2. THE STATE COURTS BELOW HAVE INTERPRETED THE STATE STATUTES APPLICABLE TO PETITIONER'S CONVICTION IN A MANNER WHICH RENDERS THOSE STATUTES UNCONSTITUTIONALLY VAGUE AND WHICH PERMITS CONVICTION UPON PROOF OF WHOLLY INNOCENT CONDUCT INVOLVING CONSTITUTIONALLY PROTECTED EXPRESSION.

In a pretrial motion, at trial, and on appeal, Petitioner has persistently contended that there can be no *attempted* violation of Ohio Revised Code § 2907.03 in circumstances where sexual conduct is deterred solely by a "victim's" successful and unassisted refusal to participate.

The basis for the contention is relatively simple. The statutory offense of Sexual Battery is similar to the crime of rape in Ohio, in that both offenses require proof that the accused engaged in "sexual conduct," defined by Ohio Revised Code § 2907.01(A) as sexual intercourse, fellatio, or cunnilingus. Where the "victim" is compelled to submit

"by force or threat of force," the crime is rape. Ohio Revised Code § 2907.02(A)(1). Where the "victim" is coerced to submit "by any means that would prevent resistance by a person of ordinary resolution," the crime is Sexual Battery. Ohio Revised Code § 2907.03(A)(1).

"Force" is an objectively measurable pressure which is specifically defined by statute as

> "* * * any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." Ohio Revised Code § 2901.01(A).

The term "coerces," on the other hand, is not defined by statute. Nor does it have any statutory antecedent or historic precedent. While it obviously involves a type of compulsion which is less than "force or threat of force," the only available objective standard by which criminality of the compulsion may be assessed is whether the compulsion is sufficient to "prevent resistance by a person of ordinary resolution." That standard disappears if conviction for an attempted violation of the statute is allowed where a "victim's" mere verbal refusal prevents sexual conduct from occurring.

The difference between "force or threat of force" and "coercion" is critical in determining whether and when unsuccessful compulsion may constitute an attempted offense under the provisions of Ohio Revised Code § 2923.02(A), which provides:

> "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense."

Obviously, attempted rape may occur where a "victim" successfully resists the physical attack of her assailant—

either alone or with the assistance of others. "Force or threat of force" need not be successful in order for a crime to result. The conduct itself is criminal.

It is also possible to conceive of an attempted sexual battery where sexual conduct is deterred, despite the offender's coercion, by factors other than the "victim's" simple refusal to participlate. However, where the coercion does not include "force or threat of force", so as to constitute the crime of attempted rape, and where the "victim's" verbal refusal to submit to pressure to engage in sexual conduct is the sole factor which prevents consummation of a sexual act, there is a complete failure of proof concerning an essential element of the offense of Attempted Sexual Battery. The "victim's" successful and unassisted resistance demonstrates that the conduct of the accused was not sufficient to "prevent resistance by a person of ordinary resolution." If the means employed were not criminal, there can be no criminal attempt.

The court of appeals below rejected this logic and concluded:

> "The nub of our analysis is the fact that she [Connie Blackstone] did not submit upon the occasion in question is not exculpatory." (Appendix, p. A4.)

By considering the "victim's" successful refusal of Petitioner's alleged advances on September 4, 1979, and on all other occasions irrelevant to the issue of whether a crime occurred, the court rejected the only objective standard by which the vague concept of "coercion" can be measured. The court's analysis empowers a jury to conclude, on the basis of whatever speculation it might choose to engage in, that a person less resolute than the "victim" of the offense charged might have succumbed. The irony of that analysis in the circumstances of the instant case

is that the State alleged and claims that it proved that the "victim" of the offense charged, although she successfully resisted pressure to submit, was a person whose ability to appraise the nature of or control her own conduct was "substantially impaired." If a person so impaired could successfully resist the alleged coercion, there is no conceivable basis for concluding that a person of ordinary resolution could not do the same.

Just as Blackstone's successful verbal rejection of Petitioner's sexual advances demonstrates that the conduct in which Petitioner allegedly engaged was not criminally coercive under Ohio Revised Code § 2907.03(A)(1), the rejection also demonstrates conclusively that Blackstone was not a person with whom even consensual sexual conduct would be criminal under Section 2907.03(A)(2). Her capacity to control her conduct was not "substantially impaired." The plain fact that she did control her conduct, on September 4, 1979 and on all other occasions, is the clearest possible proof that she was fully capable of doing so. Therefore, a non-coercive effort to engage in sexual conduct with Connie Blackstone cannot be viewed as a violation of Section 2907.03(A)(2). She was not shown to be the kind of woman with whom a male might engage in sexual conduct only upon pain of conviction of a felony of the third degree.

Any alternative interpretation of Section 2907.03 renders the statute unconstitutionally vague. If a "victim's" unassisted and successful verbal rejection of sexual advances is not accepted as conclusive proof that (1) the effort of the pursuer was not criminally coercive, and (2) the "victim's" capacity to control her conduct was not "substantially impaired," the statute violates Due Process of Law. Essential elements of the offense are undefined and undefinable. There are no statutory def-

initions of the word "coerces" or the term "substantially impaired." The trial court refused to provide definitions upon request, and that refusal was upheld by the courts below. As interpreted, the statute violates a basic requirement of Due Process.

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972).

The requirement that a penal statute speak in language sufficiently certain, precise and definite to permit men of common intelligence and understanding to understand its meaning has long been accepted as a fundamental requirement of due process of law. See, e.g., *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

The language of Section 2907.03 does not only defy comprehension by men of common intelligence and understanding, it befuddles even learned appellate judges.

Courts have been unable to agree, for example, on the simple question of whether Sexual Battery is a lesser included offense of Rape. Compare *State v. Wilkins*, 64 Ohio St. 2d 382, 415 N.E.2d 303 (1980) and *State v. Tolliver*, 49 Ohio App. 2d 258, 360 N.E.2d 750 (Hamilton Cty. 1976), to *State v. Collins*, 60 Ohio App. 2d 116, 396 N.E.2d 221 (Hancock Cty. 1977). The inherent ambiguity of the statute which defines the substantive offense was erroneously magnified by (1) the trial court's refusal to define essential elements of the offense, (2) an inappropriate and inapplicable charge on an irrelevant term, "substantially impair," borrowed by the trial court from the statute which defines Rape, and (3) removal of the only objective standard of criminality—successfully overcoming the will of the victim—by allowing conviction for an attempted violation of the statute.

Further ambiguity was created by the charge, given upon the State's request, that it was no defense that, "in retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances." (Appendix, p. A20). Since the only circumstances which rendered commission of the offense impossible were Petitioner's failure to employ criminally coercive persuasion and his failure to direct his invitations to an unacceptable individual (i.e., one whose ability to govern her conduct was substantially impaired), the jury was left free to convict simply on the ground that it did not approve of Petitioner's verbal expressions. If the applicable statutes are allowed to accomplish such bizarre results, fundamental First Amendment values will be substantially offended.

If the State of Ohio is not restrained from prosecuting unsuccessful sexual advances, unaccompanied by force or threat of force, as Attempted Sexual Batteries, people in

every walk of life will be in danger of criminal prosecution for alleged misuse of wealth or power. The fine line between aggressive persuasion and coercion will be drawn without reference to the success or failure of the conduct. Any person suffering from sadness, depression, loneliness, extended sexual deprivation or any other factor which might conceivably affect his judgment concerning the manner in which to respond to an invitation to engage in sexual conduct will be in a position to initiate criminal prosecution.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that a Writ of Certiorari issue to the Supreme Court of Ohio, to review the final judgment rendered by that Court on January 30, 1981.

Respectfully submitted,

GERALD A. MESSERMAN
Counsel of Record
MESSERMAN & MESSERMAN Co., L.P.A.
1525 Ohio Savings Plaza
Cleveland, Ohio 44114
(216) 574-9990
Counsel for Petitioner

APPENDIX

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR LEAVE TO APPEAL

(Dated January 30, 1981)

No. 80-1690

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

LEO NIERRAS,
Appellant.

MOTION FOR LEAVE TO APPEAL FROM
THE COURT OF APPEALS
for Richland County

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT DISMISSING THE APPEAL

(Dated January 30, 1981)

No. 80-1690

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

LEO NIERRAS,
Appellant.

APPEAL FROM THE COURT OF APPEALS
for Richland County

This cause, here on appeal as of right from the Court of Appeals for Richland County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

OPINION OF THE COURT OF APPEALS OF RICHLAND COUNTY, OHIO

(Filed October 10, 1980)

Case No. CA-1884

IN THE COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE STATE OF OHIO,
Plaintiff-Appellee,

VS.

LEO NIERRAS,
Defendant-Appellant.

OPINION

PUTMAN, *P.J.*

The appellant (hereafter Dr. Nierras), is a male psychiatrist who was convicted of attempting to have sexual conduct (vaginal intercourse and fellatio) with his female patient of ten months standing, Connie Blackstone, a married woman who had come to him for medical help.

The evidence, including her testimony, was corroborated in part by two police officers, and a tape recording.

Upon her complaint about Dr. Nierras, the police furnished the complaining witness, Mrs. Blackstone, a radio transmitter which she concealed in her purse when she visited Dr. Nierras.

The officers listened to the radio transmission of two visits (August 21, 1979, and September 4, 1979) and made

a tape recording of each of those radio transmissions simultaneously with their own listening (State's Exhibit 4).

The evidence is overwhelming that Dr. Nierras knew that Mrs. Blackstone believed herself to be dependent upon his help to hold her marriage together and recover her impaired nervous and emotional health, but that, notwithstanding this, he told her she wanted to make love to him when she was under hypnosis and explained, "I would never have wanted it if you did not imply it," when she protested his pressuring her to have sex with him (See Transcript of tape recording, State's Exhibit 4, pp. 15-17).

He had asked her to disrobe and engage in sexual acts with him. He agreed with the suggestion that he "liked a little strange once in a while." (Page 16 of tape transcript).

In addition to what is objectively corroborated in the tape recording in evidence, Mrs. Blackstone testified that Dr. Nierras had threatened her that if she told anyone what was happening that she would "go to Tiffin." (R-49).

It is our view that the totality of the circumstances supports beyond reasonable doubt that Dr. Nierras actually intended to coerce Mrs. Blackstone by threats which would, under the circumstances, cause a person of ordinary resolution to submit, and that he did so actually believing that her ability to resist him was substantially impaired.

The nub of our analysis is that the fact that she did not submit upon the occasion in question is not exculpating.

Reproduced and attached as Appendices A, B, C and D respectively, are the statutes on sexual battery (R.C.

2907.03) and attempt (R.C. 2923.02), the indictment and bill of particulars. The count underlying the conviction and sentence is count three of Common Pleas Case No. 10,216.

The assignments of error are Appendix E, attached hereto.

Now follows our serial consideration of the assignments of error.

I-A

In our view, a psychiatrist who solicits sex with a female patient under circumstances which constitute a threat that her failure to cooperate fully and remain silent will result in her "going to Tiffin" and the cessation of treatment, cannot be heard to say that he did not intend to employ a means of coercion sufficient to overcome the will of a person of ordinary resolution. Likewise, the fact she resisted on the date in question does not per se negate the proposition that her ability to control her conduct was substantially impaired. In short, "substantially impaired" does not mean totally powerless.

I-B

Whether the patient was, in fact, a person of ordinary resolution is not dispositive of the case. Where a psychiatrist actually does the requisite overt act intending to employ coercion which would cause a person of ordinary resolution to submit, the fact that he is unsuccessful is not exculpating.

I-C

Analyzing the statutes as stated under Roman II infra, the claim that Dr. Nierras' actual conduct was not suf-

ficient to constitute an attempt to have sexual conduct is without merit viewing the evidence most favorably in support of the judgment.

Disrobing himself, asking her to disrobe and masterbating in her presence, and asking her to have vaginal and oral sex with him, asking her to remove her slacks, are sufficient overt acts to constitute an attempt to have sexual conduct.

II.

The claim that there cannot be such a crime as attempted sexual battery has been carefully considered and is overruled. The claim that there can be no "attempt" crime as to the first and second paragraphs of R.C. 2907(A) is the most troubling of all.

However, in our view, the ". . . conduct which, if successful would . . . result in the offense" (as provided in R.C. 2923.02(A) respecting attempts) operates not only with respect to the sexual conduct described in paragraph A of R.C. 2907.03, but also separately and independently upon paragraphs A(1) and A(2) of R.C. 2907.03 relative to the separate provision respecting "when any of the following apply."

This point is essential to the validity of our affirmance. If we are incorrect as to this point of our analysis, then the appellant is entitled to an acquittal as a matter of law, irrespective of any other assignment of error.

Sexual battery does not of necessity, but may in certain cases, include the element of force or threat of force (See Rape R.C. 2907.02). See Judge Dowd's opinion in *State v. Tolliver* (1976) 49 O. App. 2d 258, 264, 3 O.O. 3d 296, 299, M.C.O. Sept. 30, 1976. (See Appendix F). However,

it is not difficult to conceptualize an attempt to have sexual conduct under the described circumstances.

III.

The trial court allowed defense counsel absolutely unlimited cross examination of Mrs. Blackstone and Officer Wendling (one of the eavesdropping policemen) using the tape recording.

Respecting Detective Stierhoff (another eavesdropping officer), he allowed extensive cross examination of the same type.

The claim of denial of right to cross examine is not supported by the record. Stierhoff admitted the conversation about Mrs. Blackstone running into the shrubs was on the tape, he simply said he couldn't independently recall it.

IV.

The defense had made on a blank tape of their own a copy of the tape recording. The original was State's Exhibit 4. It went into evidence. The defense copy of it was a tape marked Defendant's "B". It was refused when offered. The purpose for its claimed admissibility was that the defense alleged (out of the hearing of the court) that the prosecutor inferred it may have been altered. The record shows no such remark or inference on the part of the prosecutor, and arguments of counsel were not made part of the record on appeal. (See R-57, 58, 76, 183, 184, 262 and 327.)

V. (A) and (B)

The claim that the reasonable doubt instruction was incorrect is overruled on the authority of *State v. Nabozny*, 54 Ohio St. 2d 195, both as to the statutory language

and the added comment respecting ". . . convict if firmly convinced of the truth of the charge."

V-C

Appellant argues certain defendant's requested charges were erroneously rejected. No such written charges have been made a part of the record on appeal. It appears from the trial transcript discussion of them that they were properly overruled because they made "force" or "threat of force" an indispensable element of coercion. Appellant unjustifiably relies on *State v. Tolliver* (1976) which stands for just the opposite. See 49 O.A. 2d 258 at 264 and 3 O.O. 3d 296 at 299, M.C.O. 9-30-76.

Later on, the trial court offered a certain written proposed charge included among which was a definition of coercion which does not appear in the record forwarded to us. The defense objected and the court sustained it.

No Rule 30 objection to the charge finally given on coercion was made.

At R-324 both counsel told the court he overlooked a definition of sexual conduct. The court then gave a definition with which both sides expressed satisfaction (R-325, lines 12, 13.) See *State v. Lane* (1976) 49 Ohio St. 2d 77 at page 84, Prop. VII.

When, during deliberation, the jury asked for a definition of sexual imposition and sexual battery (R-328), the defense objection was limited to the definition of "force" or "threat of force" (R-329). The instruction then sent to the jury is not part of the appellate record.

Again later (R-333) the jury specifically called for a definition of "coerce" and counsel expressed satisfaction with the answer. The following appears:

> "THEREUPON, the Jury was removed from the Courtroom.

THE COURT: The Defendant is present, counsel for the parties. Mr. Romano advises me that the Jury has communicated to him that they have a verdict. However, gentlemen, just one second.

We had some two hours ago a written message from the Jury. 'Your Honor, we need a legal definition of 'coercion' and 'attempt,' signed by Dan Porte.

I wanted to put that on the Record that we supplied the answers to those two questions with agreement by counsel in writing.

MR. McKEE: So agreed, Your Honor.

MR. MESSERMAN: That's correct, Your Honor.

THEREUPON, the Jury was returned to the Courtroom and the following proceedings were had:

THE COURT: Mr. Porte, the Jury has arrived at a verdict?

MR. PORTE: Yes, we have."

Accordingly, assignment of error V-C is overruled.

V-D

There is no statutory definition of "substantially impaired" or "substantially impair." The court told the jury "substantially impair means to interfere with some other person's judgment or control in a material way."

No alternative was suggested. Criminal Rule 30 requires not merely an objection, but an express statement of "the grounds of his objection."

> "A party may not assign as error the giving or failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

V-E

The trial court's charge that retrospective impossibility under the circumstances was not a defense, came straight from the Revised Code definition of the elements of the crime of attempt (R.C. 2923.02) and was not erroneous.

VI.

The refusal of the trial court to disclose a psychiatric evaluation of the victim of the offense made by the prosecution in preparation for trial is not erroneous under Criminal Rule 16(D) referring to reports of physical or mental examinations and tests known to and under the control of the state. The name of the examining psychiatrist, Dr. Marjorie Gallagher, was furnished the defense. She did not testify. No attempt was made by the defense to call or depose her.

We find no prosecutorial misconduct. See *Brady v. Maryland* (1963) 373 U.S. 83; *Miller v. Pate,* 386 U.S. 1 (1966).

This assignment is overruled. See *State v. Lockett* (1976) 49 Ohio St. 2d 71.

For the foregoing reasons, all Assignments of Error are overruled, and the judgment of the Court of Common Pleas of Richland County is affirmed, and this cause is remanded to that court for execution of sentence.

RUTHERFORD, *J.*,

and JOHNSON, *J.*, concur

/s/ NORMAN J. PUTMAN
/s/ LELAND RUTHERFORD
/s/ NILS P. JOHNSON
Judges

Printer's Note: The appendix material attached to the original opinion has been omitted in this printing.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS OF RICHLAND COUNTY, OHIO SENTENCING PETITIONER

(Dated March 24, 1980)

Case No. 10,216

IN THE
COMMON PLEAS COURT OF RICHLAND
COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

LEO NIERRAS,
Defendant.

INDICTMENT: Attempted Sexual
Battery
R.C. 2907.03

JOURNAL ENTRY

On March 24, 1980, came the Prosecuting Attorney on behalf of the State of Ohio, and the defendant, Leo Nierras, being in court in custody of the Sheriff, represented by his attorneys, Gerald A. Messerman and Terry L. Kilgore, for sentencing upon the Indictment charging defendant with Attempted Sexual Battery;

The Court having heretofore received and accepted on February 19, 1980 a jury verdict of Guilty on Count III of Case No. 10,216, and a pre-sentence investigation having been received by the court, the court further proceeded according to law;

And the court having received and considered the pre-sentence study, inquired of the defendant and his attorneys if he or they had anything to say why sentence should not now be pronounced, and defendant having nothing further to say, defendant's attorney, Gerald A. Messerman, having addressed the court;

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the defendant, Leo Nierras, be imprisoned in the Ohio State Penitentiary at Columbus, Ohio for an indeterminate term of not less than one (1) year nor more than five (5) years.

It is further ordered that the defendant pay the costs herein taxed at $.....

/s/ MAX K. CHILCOTE
Judge

JURY VERDICT FORM OF COURT OF COMMON PLEAS, RICHLAND COUNTY, OHIO

COURT OF COMMON PLEAS
RICHLAND COUNTY, OHIO

VERDICT

THE STATE OF OHIO,

vs.

LEO NIERRAS,

COUNT TWO OF CASE NO. 10,216

We, the Jury, find the Defendant, LEO NIERRAS, not guilty of the principal crime of Gross Sexual Imposition, a felony of the fourth degree.

We, the Jury, find the Defendant, LEO NIERRAS, not guilty of the lesser crime of Sexual Imposition, a misdemeanor of the third degree.

COUNT THREE OF CASE NO. 10,216

We, the Jury, find the Defendant, LEO NIERRAS, guilty of Attempted Sexual Battery, a felony of the fourth degree.

COUNT FOUR OF CASE NO. 10,216

We, the Jury, find the Defendant, LEO NIERRAS, not guilty of the principal crime of Gross Sexual Imposition, a felony of the fourth degree.

We, the Jury, find the Defendant, LEO NIERRAS, not guilty of the lesser crime of Sexual Imposition, a misdemeanor of the third degree.

Each of us said jurors signs his name hereto this 19 day of February, 1980.

1. /s/ CHARLES R. SETSER
2. /s/ JEAN DAY
3. /s/ CHARLES COONEY
4. /s/ ARSTILOUS CLINE
5. /s/ MRS. ELEANOR MAYER
6. /s/ MARSHA J. ANDERSON
7. /s/ CHARLES V. FOREMAN
8. /s/ JOAN LANG
9. /s/ CHARLES BRINER
10. /s/ JUDY OREURLER
11. /s/ LEONARD H. BAUER
12. /s/ DAN PORTE

No. 10,183

COURT OF COMMON PLEAS
RICHLAND COUNTY, OHIO

VERDICT

(Guilty—Not Guilty)
Rev. Code Secs. 2945.171

THE STATE OF OHIO,

vs.

LEO NIERRAS,

Offense: GROSS SEXUAL IMPOSITION
R.C. 2907.05

We, the Jury in this case, find the Defendant LEO NIERRAS - Not Guilty of the offense as charged in the indictment.

Each of us said jurors signs his name hereto this 19 day of February, 1980

1. /s/ JUDY OREURLER
2. /s/ LEONARD H. BAUER
3. /s/ CHARLES BRINER
4. /s/ JOAN LANG
5. /s/ CHARLES V. FOREMAN
6. /s/ ARSTILOUS CLINE
7. /s/ CHARLES COONEY
8. /s/ JEAN DAY
9. /s/ CHARLES R. SETSER
10. /s/ MARSHA J. ANDERSON
11. /s/ ELEANOR MAYER
12. /s/ DAN PORTE

Foreman

EXCERPTS FROM TRANSCRIPT OF HEARING AT WHICH PETITIONER OBJECTED TO PROPOSED CHARGE TO JURY

(Pages 271, 272, 277, 278, 281, 282, 284, 286, 290)

[271] Mr. Messerman: * * * Your Honor, the first proposed instruction is a definition of reasonable doubt; the definition with which I am sure this Court is familiar. * * *

* * * * *

[272] The definition contained in the statute I submit, your Honor, is unconstitutional in that it dilutes the standard of proof in criminal cases in violation of the due process clause of the 14th Amendment. * * *

* * * * *

[277] * * * there is this sentence to which I object.

"If after a full and impartial consideration of all the evidence, you are firmly convinced of the truth of the charge, you must find the Defendant guilty."

* * * * *

I object, your Honor, first on the ground that having the statutory definition nothing further is required or warranted by law.

Secondly, on the ground that that single sentence is a pure and unadulterated statement of the clear and convincing evidence standard which is not supposed to be the standard in criminal cases.

[278] The Court: Isn't that less than reasonable doubt? You have got me confused.

Mr. Messerman: Yes, it is. It is less than reasonable doubt. It requires the Jury only to be firmly con-

vinced, and requiring the Jury only to be firmly convinced is not requiring them to be convinced beyond a reasonable doubt. In fact, that is precisely the way the Ohio Supreme Court has articulated the clear and convincing statute, to be clear and firmly convinced.

Secondly, it presents the Jury with what it is to do in the event the Jury is firmly convinced but not in the event that it is not firmly convinced; therefore, placing undue emphasis on what warrants a verdict of guilty as to what warrants a verdict of not guilty, so I object to that sentence.

* * * * *

[281] Mr. Messerman: I object on the grounds previously stated to the submission of Count 3 of the indictment on alternative theories under (A)(1) and (A)(2).

* * * * *

Mr. Messerman: Yes, your Honor. I object to the instruction on the elements of Count 3 of the indictment on the grounds that there is no definition of the term "substantially impaired"; ability to control her own conduct was substantially impaired.

* * * * *

[282] Mr. Messerman: That is the definition of substantially impair which is used, as I recall, in Section 2907.02 and which relates to an individual who by drugs or other means impairs the judgment of another; but it is not the definition of substantially impaired.

* * * * *

[284] Mr. Messerman: Your Honor, I object to the definition of coerce which is contained in the definitions. I have already stated the basis for that.

The Court: I will overrule you on that one.

* * * * *

[286] * * * All the objections as to the definition of substantially impair and not impaired, I am overruling that objection and leaving the instructions in as is.

* * * * *

Then there was a Defense objection to the definition in the proposed Jury Instructions of force or threat of force requiring the definition that is recited in Section 2901.01(A) of the Ohio Revised Code, and I am going to overrule that objection * * *.

* * * * *

[290] Then, Mr. Messerman, you had another request. Perhaps you would like to read it into the Record.

Mr. Messerman: The fact that a person seeks and obtains psychiatric care in a hospital or otherwise does not by itself establish that the person's ability to control her conduct is substantially impaired.

The Court: That request is denied. I think we are ready for the Jury.

Mr. Messerman: One more thing, I would like to objection to the instruction under—

The Court: 2923.02(B)?

Mr. Messerman: Yes.

The Court: Overruled. Call the Jury.

* * * * *

EXCERPTS FROM TRANSCRIPT OF THE COURT'S INSTRUCTIONS TO THE JURY

(Pages 292, 293, 304, 305, 306, 308)

[292] * * * Reasonable doubt is present when after you have carefully considered and compared all the evidence you cannot say you are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. It is not a mere possible doubt, because everything relating to human affairs or **[293]** depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

If after a full and impartial consideration of all the evidence, you are firmly convinced of the truth of the charge, you must find the Defendant guilty.

* * * * *

[304] * * * Before you can find the Defendant guilty, you must find beyond a reasonable doubt, one, that on or about the 4 day of September, 1979 and in Richland County, Ohio, the Defendant attempted to engage in sexual conduct with Connie Fay Blackstone; two, that Connie Fay Blackstone was not the spouse of the Defendant; three, that the Defendant knowingly coerced Connie Fay Blackstone to submit by any means that would prevent resistance by a person of ordinary resolution or that the Defendant knew that Connie Fay Blackstone's ability to appraise the nature of or control her own conduct was substantially impaired.

* * * * *

[305] * * * The next term is substantially impair. Substantially impair means to interfere with the other person's judgment or control in a material manner.

The next term is attempt. Attempt is some conduct purposely or knowingly performed, which conduct, if successful would constitute or result in the crime of sexual battery. The act or acts must be such as to identify the crime and to indicate its commencement, but it is not necessary that the crime actually be completed. Conduct constitutes an attempt where the acts are an immediate or substantial step in the execution of a criminal **[306]** plan which would have been completed but for the interference or interruption by some cause.

It is no defense to a charge under this section of attempt that in retrospect commission of the offense which was the object of the attempt was impossible under the circumstances. It is an affirmative defense to a charge of attempt that the actor abandoned his effort to commit the offense or otherwise prevented its commission under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

* * * * *

[308] * * * Sexual contact means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttocks, pubic region, or if such a person is a female, a breast for the purpose of sexually arousing or gratifying either person.

* * * * *

[309] * * * I will explain force or threat of force, means any violence, compulsion or constraint physically exerted or threatened to be exerted by any means upon or against a person or thing.

EXCERPTS FROM TRANSCRIPT OF HEARING ON MOTION TO DISMISS INDICTMENTS - CONTAINING THE RULING ON THE MOTION TO DISMISS BY THE COURT OF COMMON PLEAS OF RICHLAND COUNTY, OHIO

(Dated February 6, 1980, page 2 and page 35)

PROCEEDINGS (February 6, 1980)

[2] The Court: We have the State of Ohio versus Leo Nierras, two cases; 10,183 and 10,216. We have before the Court in both cases Motions to Dismiss the indictment by the Defendant stating two grounds; one, failure of the State to state offenses, and, secondly, the appropriate statutes are unconstitutional.

* * * * *

[35] The Court: Thank you. I am just a foxhole judge. I am not up there when they make all that law. I am just a front-line soldier on this thing.

I find that your Motions are not well taken and overruled.

* * * * *

EXCERPTS FROM TRANSCRIPT FOR MOTION FOR JUDGMENT OF ACQUITTAL

* * * * *

[236] Mr. Messerman: Your Honor, I move pursuant to Rule 29 of the Ohio Rules of Criminal Procedure for judgment of acquittal on the grounds that reasonable minds could come but to one conclusion.

* * * * *

[242] In order to sustain conviction on the charge of attempted sexual battery, the State must prove either coercion by the Defendant which would overcome the will of a person of ordinary resolution, or engaging in sexual conduct with a person whose ability to determine whether or not they should participate is substantially impaired.

First, with respect to the question of coercion, there is no evidence of coercion in this case. There is no evidence that whatever device was employed—again, assuming drawing all inferences most favorable to the State—Assume there was an invitation to engage in sexual conduct. I'm assuming that for the purpose of this argument there was an invitation to engage in sexual conduct; that invitation clearly did not overcome the resistance of Connie Blackstone.

There was no evidence **[243]** that it would have overcome the resistance of a person of ordinary resolution. If it didn't overcome the resistance of a person of ordinary resolution—nor was it the kind of invitation which would overcome the resistance of a person of ordinary resolution —then it is not criminal. There is no coercion, and it doesn't become an attempt because they have got to prove the coercion.

We don't have any testimony or evidence in this case that Connie Blackstone either was or was not a person of ordinary resolution. We don't have any testimony in this case concerning how a person of ordinary resolution would have responded to the invitation other than the response that was actually offered. That response was by Connie Blackstone; and, again, drawing all inferences most favorable to the State, the response was no. Therefore, no coercion.

The question of whether or not Connie Blackstone was a person whose ability to control her judgment was

substantially impaired is a question upon **[244]** which absolutely no evidence has been offered by the State, apparently, by choice.

There is testimony in this case that she was psychiatrically evaluated on behalf ot the State. There is testimony in this case that she had previously been hospitalized. There is presumably testimony that would be available to the State concerning the question of whether or not there was substantial impairment. There is no evidence of substantial impairment.

Absent either coercion or substantial impairment, there is no evidence to go to the Jury. All the Jury can do is guess on what the terms mean as to what the evidence is and speculate as to what they are supposed to be in a criminal case.

* * * * *

[249] The Court: Gentlemen, I have no doubt in my mind we have got Jury questions, so I'm overruling your Motion, Mr. Messerman.

* * * * *

INDICTMENT

COURT OF COMMON PLEAS

THE STATE OF OHIO, RICHLAND COUNTY, SS.

INDICTMENT FOR

GROSS SEXUAL IMPOSITION (TWO COUNTS)
ATTEMPTED SEXUAL BATTERY (TWO COUNTS)

Rev. Code, Secs. 2939.20, .22; 2941.06, .49

Of the Term of September in the Year of our Lord one thousand nine hundred and Seventy-nine.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that LEO NIERRAS on or about the 21st day of August 1979, at the County of Richland aforesaid did[1] attempt to engage in sexual conduct with Connie Fay Blackstone, not the spouse of the said Leo Nierras, in that he knowingly coerced Connie Fay Blackstone to submit by means that would prevent resistance by a person of ordinary resolution and that he did make said attempt knowingly that Connie Fay Blackstone's ability to appraise the nature of or control her own conduct was substantially impaired, in violation of Section 2907.03 of the Ohio Revised Code, a felony of the fourth degree.

COUNT TWO

that on or about the 21st day of August, 1979, at the County of Richland, one LEO NIERRAS did have sexual contact with Connie Fay Blackstone, not the spouse of the said Leo Nierras, and did purposely compel her to submit by force or threat of force, in violation of Section 2907.05 of the Ohio Revised Code, a felony of the fourth degree.

COUNT THREE

that on or about the 4th day of September 1979, at the County of Richland, one LEO NIERRAS did attempt to engage in sexual conduct with Connie Fay Blackstone, not the spouse of the said Leo Nierras, in that he knowingly coerced Connie Fay Blackstone to submit by means that would prevent resistance by a person of ordinary resolution and that he did make said attempt knowing that Connie Fay Blackstone's ability to appraise the nature of or control her own conduct was substantially impaired, in violation of Section 2907.03 of the Ohio Revised Code, a felony of the fourth degree.

COUNT FOUR

that on or about the 4th day of September 1979, at the County of Richland, one LEO NIERRAS did have sexual contact with Connie Fay Blackstone, not the spouse of the said Leo Nierras, and did purposely compel her to submit by force or threat of force, in violation of Section 2907.05 of the Ohio Revised Code, a felony of the fourth degree.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ WILLIAM F. McKEE
Prosecuting Attorney
/s/ FRANK A. STUMBO
Foreman of the Grand Jury

Endorsed a true bill.